IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

GOOGLE INC.,

Plaintiff,

v.

ROCKSTAR CONSORTIUM U.S. LP, MOBILESTAR TECHNOLOGIES, LLC,

Defendants.

/

No. C 13-5933 CW

ORDER DENYING MOTION FOR INTERLOCUTORY APPEAL

(Docket No. 66)

In this patent infringement case, Defendants Rockstar Consortium U.S. LP (Rockstar) and MobileStar Technologies, LLC (MobileStar) previously moved to dismiss for lack of personal jurisdiction or, in the alternative, to transfer to the Eastern District of Texas. The Court denied Defendants' motion. Defendants now seek to certify the Court's Order for interlocutory review by the Federal Circuit. Plaintiff Google, Inc. opposes. Having considered the papers, the Court DENIES the motion.

## BACKGROUND

The Court's prior order denying Defendants' motion to dismiss or, in the alternative, to transfer lays out the underlying factual background in great detail, and so the Court provides only the procedural history relevant to the present motion.

On January 23, 2014, Defendants moved to dismiss this action for lack of personal jurisdiction and improper venue and to

decline jurisdiction under the Declaratory Judgment Act. Docket No. 20. The Court held a hearing on March 13, 2014. The Court denied Defendants' motion, holding it had specific jurisdiction because, "with conflicts in the allegations and evidence resolved in [Google's] favor, Google has shown that it is likely that Defendants have created continuing obligations with a forum resident to marshal the asserted patents such that it would not be unreasonable to require Defendants to submit to the burdens of litigation in this forum." Docket No. 58 (Order) at 19-20. The Court further found that there was no reason to decline declaratory judgment jurisdiction or transfer the case to the Eastern District of Texas because the § 1404 convenience factors either favored this forum or were neutral. See, generally, Order at 20-28.

Defendants now move for certification of the Court's Order for interlocutory review under 28 U.S.C. § 1292(b). Specifically, they seek to certify the following question:

> Whether Rockstar US LP, a Delaware limited partnership resident in the Eastern District of Texas is subject to personal jurisdiction in the Northern District of California, due to its alleged "continuing obligations" to Apple, one of its five limited partners, without (a) piercing the corporate veil or establishing that Rockstar is the "alter ego" of Apple; or (b) proving that any "continuing obligation" Rockstar is alleged to owe Apple (or another forum resident) relates to enforcing the patents-in-suit in the Northern District of California, not other forums.

Docket No. 66 at 6.

LEGAL STANDARDS

Under 28 U.S.C. § 1292(b), the Court may certify an otherwise non-final order if: (1) it involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) an immediate appeal may "materially advance the ultimate termination of the litigation." The party seeking interlocutory review bears the burden of showing that all of these factors are met. Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010).

Certification under § 1292(b) "is a departure from the normal rule that only final judgments are appealable, and therefore must be construed narrowly." Mendez v. R+L Carriers, Inc., 2013 WL 1004293, at *1 (N.D. Cal.) (quoting James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1068 n.6 (9th Cir. 2002)). The moving party bears the burden of establishing "exceptional circumstances justify[ing] a departure from the basic policy of postponing appellate review until after the entry of a final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978). The district court has discretion to determine whether an interlocutory appeal would advance or delay the resolution of the litigation. See Swint v. Chambers Cnty. Comm'n, 514 U.S. 35, 47 (1995).

DISCUSSION

Defendants argue that the Court's Order involves a controlling question of jurisdictional law as to which there is a

substantial ground of difference of opinion. As described previously, Defendants argue that the Court erred in finding them subject to personal jurisdiction in this district due to their continuing obligations to Apple, even though the Court did not (1) pierce the corporate veil between Rockstar and Apple, such as by finding that Rockstar is the alter ego of Apple, and (2) find that the continuing obligation relates to enforcement of the patents-in-suit in this forum.

Federal Circuit precedent is clear on both points. As explained in this Court's order, Defendants misunderstand both Google's theory of jurisdiction as well as Federal Circuit precedent. Order at 17 n.6. Google did not argue that Rockstar was Apple's alter ego, nor was it required to do so in order to establish jurisdiction. Rather, Google argued that Rockstar entered into a relationship with Apple, exceeding the kind existing between a company and its passive stakeholder, which obliged Rockstar to marshal the patents-in-suit against Google and its Android platform. To support this allegation, Google presented articles stating that the CEO of Rockstar, John Veschi, maintains frequent contact with the intellectual property departments of its investors such as Google; the fact that Apple appeared to be a majority shareholder based on the size of its investment; Apple's history of expressing an intention to interfere with Google's business; and the suspicious circumstances of Defendants specifically suing Google's customers, but not

Google, based on their use of the Android platform, which is consistent with motivations arising from the historical Google-Apple rivalry. Defendants had the opportunity to present their own contrary evidence, but chose not to challenge the factual allegations and evidence underlying Google's arguments. For the most part, Defendants instead maintained that there was "no reason to entertain futile jurisdictional discovery." Defendants' Reply to Motion to Dismiss at 12. Defendants said the same at the hearing. The Court accordingly accepted Google's evidence and allegations and found that Defendants indeed entered into an undertaking with Apple that obliged Defendants to enforce the patents-in-suit against Google, its cross-town rival, in a way that interfered with Google's business.

Defendants state that their Motion for Interlocutory Review "accept[s] Google's pleaded allegations that the Court's factual findings rest on as true." Defendants' Motion for Interlocutory Review at 2. Yet Defendants elsewhere attempt indirectly to challenge the Court's factual findings. See id. at 2 n.2 ("Google asserted that Apple is Rockstar's 'majority shareholder,' but that assertion is incorrect."); Defendants' Reply to Motion for Interlocutory Review at 6 ("As explained in Defendants' Motion [for Interlocutory Review], Defendants do not owe any enforcement obligation to Apple, or any other limited partner, in any forum"). If Defendants now wish to challenge the Court's decision on a factual basis, then they must follow the protocol for moving for

reconsideration and explain why they did not previously present certain material facts in their argument. See Civ. L.R. 7-9(b) ("the moving party must specifically show reasonable diligence in bringing the motion," along with the "emergence of new material facts"). Otherwise, Defendants have waived those factual arguments and cannot present them now. See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 704 (1982) ("the requirement of personal jurisdiction may be intentionally waived, or for various reasons a defendant may be estopped from raising the issue").[1]

The uncontroverted facts presented by Google and recognized by the Court are sufficient to find specific jurisdiction over Defendants under established Federal Circuit case law. While infringement letters are "purposefully directed at the forum and the declaratory judgment action 'arises out of' the letters," the Federal Circuit additionally requires, in the interests of fair play and justice, that the defendant have engaged in "'other activities' directed at the forum and related to the cause of action." Avocent Huntsville Corp. v. Aten Int'l Co., Ltd., 552 F.3d 1324, 1333 (2008) (emphasis omitted). "Examples of those 'other activities' include initiating judicial or extra-judicial patent enforcement within the forum, or entering into an exclusive

[1] In any event, the Court's decision regarding jurisdiction did not depend solely on the facts that Defendants challenge now, such as the size of Apple's stake in Rockstar. See Order at 18.

license agreement or other undertaking which imposes enforcement obligations with a party residing or regularly doing business in the forum." Id. at 1334.[2]

Because Google successfully demonstrated that Defendants entered into an "undertaking which imposes enforcement obligations with a party residing or regularly doing business in the forum" (Apple), Google did not need to prove further that Defendants engaged in "judicial or extra-judicial patent enforcement within the forum." Finding that the defendant engaged in enforcement activities inside the forum is an alternative ground for exercising jurisdiction, not the exclusive one. See Avocent Huntsville Corp., 552 F.3d at 1334 (describing two grounds for finding the exercise of jurisdiction would be fair and just: "initiating judicial or extra-judicial patent enforcement within

[2] See also Campbell Pet Co. v. Miale, 542 F.3d 879, 886 (Fed. Cir. 2008) (finding jurisdiction over a patentee who conducted extra-judicial patent enforcement by enlisting a third party in the forum to remove defendant's products from a trade show); Genetic Implant Sys., Inc. v. Core-Vent Corp., 123 F.3d 1455, 1458 (Fed. Cir. 1997) (holding that specific jurisdiction existed over patentee because it had appointed an in-state distributor to sell a product covered by the asserted patent, which was a business relationship "analogous to a grant of a patent license" and created obligations to sue third-party infringers); Akro Corp. v. Luker, 45 F.3d 1541, 1548-49 (Fed. Cir. 1995) (because defendant had entered into an exclusive licensing agreement with one of the alleged infringer's competitors, which meant that defendant had "obligations . . . to defend and pursue any infringement" of the patent, specific jurisdiction was proper); SRAM Corp. v. Sunrace Roots Enter. Co., Ltd., 390 F. Supp. 2d 781, 787 (N.D. Ill. 2005) (specific jurisdiction was proper where defendant had "purposefully directed its activities" at residents of the forum by marketing a product that directly competed with the alleged infringer).

the forum, or entering into an exclusive license agreement or other undertaking which imposes enforcement obligations with a party residing or regularly doing business in the forum"); Autogenomics, Inc. v. Oxford Gene Tech. Ltd., 566 F.3d 1012, 1020 (Fed. Cir. 2009) (explaining that "enforcement efforts in the forum" can create specific jurisdiction, as opposed to an obligation with a forum resident). Defendants' Texas suit against Google's customers merely serves as supporting evidence for the inference that Defendants undertook an obligation to Apple to disrupt Google's business. It is the relationship to a forum resident itself,[3] which allegedly obliged Defendants to take actions expressly aimed at causing harm to another forum resident, that connects the case to this district. See Avocent Huntsville Corp., 552 F.3d at 1331 ("The Supreme Court has also instructed that personal jurisdiction may be proper because of a defendant's intentional conduct in another State calculated to cause injury to the plaintiff in the forum State.") (quoting Calder v. Jones, 465

[3] See Breckenridge Pharm., Inc. v. Metabolite Labs., Inc., 444 F.3d 1356, 1365 (Fed. Cir. 2006) (explaining that "the plaintiff need not be the forum resident toward whom any, much less all, of the defendant's relevant activities were purposefully directed.").

U.S. 783, 791 (1984)) (internal brackets and quotation marks omitted).[4]

Because case law is settled on both of Defendants' points, Defendants have not established that the Court's order involves a controlling question of law upon which there is substantial ground for difference of opinion.

Further, immediate appeal of the order will not materially advance the ultimate termination of the litigation. While Defendants are correct that personal jurisdiction is essential to the Court's authority, not every jurisdictional question over which the parties disagree must be certified for interlocutory review. See Things Remembered v. Petrarca, 516 U.S. 124, 132 n.1 (1995) (Ginsburg, J., concurring). Defendants contend that review will materially advance the litigation because jurisdiction is case-dispositive, but this argument is unpersuasive because it can be made any time a case-dispositive motion is denied, which is not

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[4] See Calder, 465 U.S. at 789 (finding jurisdiction over defendants because "their intentional, and allegedly tortious, actions were expressly aimed at California"); 4 Charles A. Wright, et al., Federal Practice and Procedure § 1067.1 (3d ed. Westlaw 2014) ("Thus, the 'effects test' continues to have viability, but only when the defendant's conduct both has an effect in the forum state and was directed at the forum state by the defendant"); Silent Drive, Inc. v. Strong Indus., Inc., 326 F.3d 1194, 1204 (Fed. Cir. 2003) (finding jurisdiction over Texas corporate defendant because its activities enforcing a Texas injunction "were all 'expressly aimed' at the Iowa corporate plaintiff," and defendant "knew the activities would have the potentially devastating effects of inhibiting [the Iowa corporate plaintiff] from producing the MAXLE and its customers from buying it") (internal brackets omitted).

in of itself extraordinary. Getz v. Boeing Co., 2009 WL 3765506, at *2 (N.D. Cal.). If the appeal were to fail, the Court of Appeal would be "burdened with a second appeal" involving issues that could have been considered together. Id. at *2. Moreover, regardless of the outcome of the appeal, the parties would continue to litigate this action, albeit in a different forum, without the benefit of any simplification of the issues or narrowing of the scope of discovery. Fed. Hous. Fin. Agency v. UBS Americas, Inc. 858 F. Supp. 2d 306, 338 (S.D.N.Y. 2012). Because Defendants have failed to show that an immediate appeal would be likely materially to advance or narrow the proceedings at hand, there is no reason to certify Defendants' proposed question for interlocutory review.

IT IS SO ORDERED.

Dated: 8/20/2014

CLAUDIA WILKEN
United States District Judge